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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 354

AUBREY AEBY AND NORENE AEBY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 144-150) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1953 (R. 150), and an order denying a petition for rehearing was entered on August 26, 1953 (R. 162). The petition for a writ of certiorari was filed on September 17, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether there was substantial evidence to support the conviction of petitioner Aubrey Aeby.

2. Whether the two counts of the indictment sufficiently apprised the petitioners of all the elements of the crimes charged.

3. Whether prejudicial errors were committed at the trial.

STATUTES INVOLVED

Section 2(c) of the Narcotic Drugs Act, 42 Stat. 596, as amended, 65 Stat. 767, 21 U. S. C. (Supp. V) 174, provides:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than ten or more than twenty years. Upon conviction for a second or subsequent offense, the imposition or execution of sentence shall not be suspended and pro-

bation shall not be granted. For the purpose of this subdivision, an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which is provided in this subdivision or in section 2557(b)(1) of the Internal Revenue Code, or if he previously has been convicted of any offense the penalty for which was provided in section 9, chapter 1, of the Act of December 17, 1914 (38 Stat. 789), as amended; section 1, chapter 202 of the Act of May 26, 1922 (42 Stat. 596), as amended; section 12, chapter 553, of the Act of August 2, 1937 (50 Stat. 556), as amended; or sections 2557 (b)(1) or 2596 of the Internal Revenue Code enacted February 10, 1939 (ch. 2, 53 Stat. 274, 282), as amended. After conviction, but prior to pronouncement of sentence, the court shall be advised by the United States attorney whether the conviction is the offender's first or a subsequent offense. If it is not a first offense, the United States attorney shall file an information setting forth the prior convictions. The offender shall have the opportunity in open court to affirm or deny that he is identical with the person previously convicted. If he denies the identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted. If the offender is found by the jury to be the person previously convicted, or if he acknowledges that he is such person, he shall be sentenced as prescribed in this subdivision.

Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

The pertinent provisions of the Internal Revenue Code provide:

Section 2553(a). General Requirement.—It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550(a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps for any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax.

[26 U. S. C. 2553(a).]

Section 2557 [as amended by the Act of November 2, 1951, 65 Stat. 767]. Whoever commits an offense or conspires to commit an offense described in this subchapter, subchapter C of this chapter, or parts V or VI of subchapter A of chapter 27, for which no specific penalty is otherwise provided, shall be fined not more than $2,000 and im-

prisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than ten or more than twenty years. Upon conviction for a second or subsequent offense, the imposition or execution of sentence shall not be suspended and probation shall not be granted. For the purpose of this paragraph, an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which is provided in this paragraph or in section 2 (c) of the Narcotic Drugs Import and Export Act, as amended (U.S.C., title 21, sec. 174), or if he previously has been convicted of any offense the penalty for which was provided in section 9, chapter 1, of the Act of December 17, 1914 (38 Stat. 789), as amended; section 1, chapter 202, of the Act of May 26, 1922 (42 Stat. 596), as amended; section 12, Chapter 553, of the Act of August 2, 1937 (50 Stat. 556), as amended; or sections 2557 (b) (1) or 2596 of the Internal Revenue Code enacted February 10, 1939 (ch. 2, 53 Stat. 274, 282), as amended. After conviction, but prior to pronouncement of sentence, the court shall be advised by the United States attorney whether the conviction is the offender's first or a subsequent offense. If it is not a first offense, the United States attorney shall file an information setting forth the prior convictions. The offender shall have the op-

portunity in open court to affirm or deny that he is identical with the person previously convicted. If he denies the identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted. If the offender is found by the jury to be the person previously convicted, or if he acknowledges that he is such person, he shall be sentenced as prescribed in this paragraph.

[26 U. S. C. (Supp. V.) 2557.]

STATEMENT

After a jury trial, both petitioners were found guilty under both counts of a two-count indictment charging them with (1) receiving and concealing 191 grains of heroin, knowing them to have been illegally imported into the United States, in violation of Section 2 (c) of the Narcotic Drugs Act, 21 U.S.C. 174, *supra,* pp. 2-4, and (2) knowingly purchasing 191 grains of heroin not in the original stamped package, and on which the tax had not been paid, in violation of Section 2553(a) of the Internal Revenue Code, *supra,* p. 4 (R. 1-2, 12-16). Petitioner Aubrey Aeby was sentenced to twenty years' imprisonment (R. 12-14), and petitioner Norene Aeby to ten years' imprisonment, both coming under the provisions of Section 2(c), *supra,* pp. 2-4, and Section 2557 of the Internal Revenue Code, *supra,* pp. 4-6, as persons convicted more than three times of similar crimes. On appeal the judgments were affirmed, one judge dissenting as to petitioner Aubrey Aeby (R. 150).

The evidence for the Government may be summarized as follows:

For about thirty days prior to June 26, 1952, police officers of the city of Dallas, Texas, maintained surveillance a short distance from the house of petitioners. From their position, about 75 yards away, they could see anyone coming to or leaving the five-room house (R. 18-21).

On June 26, 1952 about 4:00 a. m., city detective Totten took a position near the house, and about 20 minutes later saw the lights go on inside (R. 22-23). About 4:30, just as it was getting light, he saw petitioner Aubrey Aeby, the husband of Norene Aeby, leave the house and drive off with another man in a small truck (R. 23, 52-53).

Officer Totten continued to watch the house and observed that no one else entered it thereafter (R. 47). Shortly after Aubrey's departure, two other city officers arrived on the scene with a search warrant permitting search of the premises for narcotic drugs (R. 26, 77, 98-100, Gov. Ex. 9). The three officers knocked on the door but no one answered. Then they went around to a side door which they found open, and they walked through the house to the front bedroom, where petitioner Norene Aeby was in bed asleep. She was put under arrest, and as the officers were placing handcuffs on her, they noticed a rubber finger stall pinned to the front of her nightgown (R. 25, 56, 64-65). This subsequently was found to contain 191 grains of heroin mixed with milk sugar (R. 106, Gov. Ex. 1).

The officers then searched the house. They found three spoons in the bathroom (Gov. Ex. 2, R. 31-32, 79), blackened in such a way as to indicate that a match had been applied to them (R. 83). In the kitchen they found a hypodermic needle and syringe on top of the sink (Gov. Ex. 3, R. 35), and elsewhere in the kitchen another hypodermic, a quantity of cellophane bags, gelatin capsules, rubber gloves (some with the fingers cut out), parts of other rubber gloves, and a set of delicately balanced scales (Gov. Ex. 5, 6, 7, 8, R. 38-45). Six more rubber finger stalls were found in the front and back bedrooms, and in the kitchen (Gov. Ex. 4, R. 37-38). Government witnesses testified that rubber finger stalls and cellophane bags are customarily used as containers for narcotic drugs, and that spoons similar to Government Exhibit 2, are used by narcotic handlers (R. 81-84).

A chemist employed by the Alcohol Tax Division in New Orleans, testified that he received Government Exhibits 1 to 8 by registered mail at the New Orleans laboratories and in addition to the heroin contained in the rubber finger stall (Gov. Ex. 1), he found through tests a deposit of heroin on the spoons, on pieces of another finger stall, on the hypodermic syringes, and on the pans of the scale (R. 107-109).

ARGUMENT

1. The contention of petitioner Aubrey Aeby that there was no substantial evidence to sustain the verdict as to him (Pet. 22), is refuted by the record. Between the time that Aubrey Aeby was

seen to leave his home, and the execution of a search warrant shortly thereafter, no one entered the house. When the three officers entered they found, in addition to the quantity of heroin concealed on the person of his wife, who had apparently been sleeping after his departure, the full paraphernalia of narcotics handlers distributed throughout the house in two bedrooms, in various places in the kitchen, and in the bathroom. The presence of burned spoons, large quantities of cellophane bags and gelatin capsules, delicate scales, rubber gloves, and other articles, points to the involvement by both occupants of the house in the activities there being performed. The jury had ample basis to infer that Aubrey Aeby, as head of the household, was well aware of, and participated in, the receipt and concealment of the large quantity of heroin, as well as its purchase in a container not in the original package.

Had petitioner been arrested before he stepped out of his house there would be no doubt that he was as much in possession of the large quantity of heroin as his wife. The fact that the search and arrest was made a short time subsequent to his leaving the house does nothing to destroy the inference that he was jointly in possession of the heroin with his wife. The evidence amply sustains the conclusion that nothing in the house had changed between Aubrey's leaving, and the execution of the search warrant by the officers.

Moreover, the trial court gave full instructions on the law relating to aiding and abetting (R. 127-

128). Clearly, as a minimal proposition, the evidence establishes that petitioner abetted the crimes committed by his wife. Such involvement suffices to sustain the verdict. See 18 U.S.C. 2.

2. Petitioners assert that the indictment was defective (Pet. 32-33). They contend that the first count failed to charge that the receiving and concealing was done "fraudulently" in addition to being done "knowingly" as charged. The statute, Section 2 (c) of the Narcotic Drugs Act, *supra*, pp. 2-4, requires a fraudulent or knowing state of mind only in the importation of the proscribed merchandise. The crime charged in the first count is defined by the following language of the same section:

> Whoever * * * receives, conceals * * * any such narcotic drug after being imported or brought in, *knowing* the same to have been imported contrary to law * * * shall be fined * * *. [Italics added.]

The scienter element of the crime charged is thus satisfied by proving a receiving and concealing of narcotic drugs *knowing* them to have been illegally imported. *United States* v. *Williams*, 202 F. 2d 712 (C.A. 5); *Shafer* v. *United States*, 179 F. 2d 929 (C.A. 9), certiorari denied, 339 U.S. 979. See also: *Arzaga* v. *United States*, 189 F. 2d 256 (C.A. 9). This the indictment specifically charged.

Petitioners also contend that the allegation in the second count based on 26 U.S.C. 2553(a), *supra*, p. 4, to the effect that they had narcotics "in their possession", was surplusage, and prejudicial.

However, since unexplained possession of such drugs without stamps, is made prima facie evidence of a violation of the section without the necessity of proving a purchase or sale (cf. *Casey* v. *United States*, 276 U.S. 413, 418) the averment, even though not essential, could not have prejudiced the petitioners.[1]

3. Petitioners also allege as trial errors various matters which, we submit, are patently misconceived.

a. The first such contention raised by petitioner Aubrey Aeby alone, is that (Pet. 22) "* * * the Government was permitted over his objections to place his reputation in issue before the Jury * * *." The fallacy of this allegation is demonstrated by reference to the record (R. 112-114). During the cross-examination of a policeman called as a defense witness to testify that petitioner Aubrey Aeby was engaged in a legitimate business, the witness was asked "Now, of course, you don't know anything about his reputation?" Defense counsel immediately objected before answer, the court sustained the objection, and instructed the jury that reputation was not in issue, and told them, in fact, that petitioner was presumed to have a good reputation. No testimony was thereafter introduced to impeach either petitioner's reputation.

b. Petitioners also contend (Pet. 22-23) that they were prejudiced by a statement made by officer Totten during cross-examination to the effect that petitioner Aubrey Aeby "* * * had let women take

[1] The general sentence as to each petitioner is sustainable on either count alone.

the rap for him before." The witness who had conducted the search on which the charges were founded was cross-examined as to his testimony given before the United States Commissioner concerning the circumstances of the arrest (R. 54-56, 58). The following occurred (R. 59-60):

Q. Now then, this question was asked you:

"And isn't it a fact this defendant, Mrs. Aeby, told you her husband Aubrey knew nothing about any narcotics being on the premises?"

And you answered: "That is right."

A. That is right.

Q. And she told you that he didn't know anything about it, that is right, isn't it?

A. That is what she told us.

Q. And that is what Aubrey told you when you arrested him, too, wasn't it?

A. No.

Q. Substantially that, I mean?

A. No, he didn't tell me that.

Q. Well, I believe you answered that question over in the—before the Commissioner, in this form, see, there your answer to the question was, "Well, he said, 'Well, if she got caught with something out there, she will have to rap for it' ".

Is that it?

A. She will have to take the rap for it.

Q. Is that right?

A. Yes, sir.

Q. In other words, leaving the inference with you, or that was substantially telling you that he didn't know anything about it, isn't that right?

A. Now, that isn't what it left with me.
Mr. May:
Go ahead and finish your answer.
A. I knew he had let women take the rap for him before.

The remarks of the witness now objected to (R. 59-60) were obviously responsive to the questions asked by the defense.[2] Moreover, immediately after the witness had answered the question the trial court instructed the jury to disregard the testimony about "taking the rap" (R. 60). It is not clear that it was incumbent on the court to expunge testimony which the defense had invited, but it is clear that this incident did not merit the granting of petitioners' motion for a new trial.

c. Petitioner Norene Aeby contends that the trial court allowed the Government to comment on her refusal to testify (Pet. 23). This contention apparently stems from a colloquy which occurred when Government counsel questioned the relevancy of a defense effort to prove that Mrs. Aeby had her own bank account. The following ensued (R. 122-123):

> Mr. Jones [defense counsel]: She has her own bank account. They are trying to contend that they had scales and were big operators, and that kind of business. We are going to show that she is an addict, and her husband cannot even check on her bank account. It is a circumstance, and that is all.

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[2] Petitioners now erroneously state that the trial court erred in permitting (Pet. 22-23) "* * * the *Government* to put in evidence before the Jury, over the strenuous objection of Petitioner, highly prejudicial testimony * * *." [Italics added.]

> Mr. May: If he wants to show she is an addict, she ought to get on the stand.
>
> Mr. Jones: We object to commenting on her failure to testify.
>
> The Court: I don't see the relevancy.
>
> I will state, however, it is her privilege not to testify, and nobody should comment on it.

It is clear from this dialogue that defense counsel gratuitously stated in open court that petitioner Norene Aeby was an addict, to which statement Government counsel objected. The court then instructed that petitioner had a privilege not to testify (R. 123), and in his final charge to the jury he reiterated this principle (R. 126). No prejudice could have resulted from these statements.

d. Petitioners contend that the witness who identified the seized substance as heroin was not properly qualified as an expert (Pet. 23-24). The witness testified that he was employed as a chemist by the Alcohol Tax Division in New Orleans, and that he received the exhibits by registered mail at the laboratories of that division. In the absence of any objection or cross-examination by the defense, these facts suffice to qualify the witness as an expert. The question of the qualifications of an expert rests largely in the sound discretion of the trial court, and the exercise of that discretion is not ordinarily disturbed on appeal. *Gila Valley R. R. Co* v. *Lyon,* 203 U.S. 465, 475; *United States* v. *German-American Vocational League,* 153 F. 2d 860, 865 (C.A. 3), certiorari denied, 328 U.S. 833; *Hodge* v. *United States,* 13 F. 2d 596, 599 (C.A. 6).

e. Petitioners assert (Pet. 33-34) that in sen-

tencing them, the trial court should have empanelled a jury to try the issue of whether the previous convictions of each for similar violations related to them or other persons. The short answer to this is that they did not and do not now deny that they were the persons to whom the previous convictions related. The statute requires a trial on the issue only if there is a denial of identity. See the provisions of Sec. 2(c) of the Narcotic Drugs Act, *supra*, pp. 2-4.

Petitioners make a catch-all objection to the charge to the jury (Pet. 31-32), which is refuted by a mere reading of the charge (R. 124-128). The instructions are a clear exposition of the law, calculated to inform rather than confuse the jury. The term "possession" was clearly defined in terms of common understanding. As the court below held, the charge "covered the real issues in the case" (R. 149).

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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